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No. 87-1767

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

TYLER PIPE INDUSTRIES, INC.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Appellee, State of Washington, Department of Revenue, moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that the questions presented are so unsubstantial as to require no further argument.[1]

JURISDICTION

Tyler Pipe Industries, Inc. (TPI) is not entitled to appeal the Washington Supreme Court's decision in *Na-*

[1]This action is not subject to review by appeal pursuant to 28 U.S.C. § 1257(2). See Jurisdiction, *infra.*, p. 1. If this action is treated as a petition for writ of certiorari, the State respectfully requests that this Court deny the petition.

tional Can Corporation v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) pursuant to 28 U.S.C. § 1257(2).[2] In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. ___, 107 S.Ct. 2810 (1987) this Court invalidated Washington's multiple activities exemption, Wash. Rev. Code § 82.04.440. The fact that *National Can* "deals with the effects" of *Tyler Pipe* does not confer jurisdiction by appeal. J.S. 6. On remand the Washington Supreme Court did not sustain the validity of that statute against challenge under the U.S. Constitution, as required by 28 U.S.C. § 1257(2). Instead, the court ruled that *Tyler Pipe* should not be applied retroactively. Thus, TPI is entitled to seek review only pursuant to a petition for writ of certiorari under 28 U.S.C. § 1257(3). TPI's Jurisdictional Statement should be considered as such a petition pursuant to 28 U.S.C. § 2103.

STATEMENT OF THE CASE

TPI sells plumbing pipe and related products in Washington that are manufactured outside this State. Washington imposed wholesaling business and occupation (B&O) tax on these sales for the period 1976 through September 1980. TPI seeks a refund of this tax.

TPI's Statement of the Case details a chronology of the litigation involving this tax. J.S. 7-9. By emphasizing that at each stage of the proceeding it asserted that the tax "violated the Due Process and Commerce Clauses of the United States Constitution" (J.S. 7 and 8), TPI implies that it spearheaded the particular challenge that caused this Court to invalidate the multiple activities exemption in Washington's gross receipts tax. Actually, TPI's claims were much more limited. TPI's administrative appeal confined its constitutional claim to the assertion that it had insufficient contact or nexus with Washington to support

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[2]National Can Corporation and other consolidated taxpayers also seek review of *National Can* by this Court. See *National Can Corporation, et. al. v. State of Washington Department of Revenue*, U. S. Supreme Court Docket No. 87-1629.

the tax and that the amount of the tax was not fairly related to the benefits provided by the State. Petition for Correction of Assessment dated February 25, 1981 at 3.

When its administrative appeal was denied, TPI filed a declaratory judgment action seeking injunctive relief. TPI again asserted that the tax

> violates the Due Process and Interstate Commerce Clauses of the United States Constitution *since there is not a sufficient nexus* or contact with the State of Washington to constitutionally impose the tax and since the *amount of tax assessed is not fairly related* to the benefits, if any, received by [TPI] from the State of Washington.

Complaint For Declaration of Invalidity of Tax Assessment, Injunction and Other Relief at 3, *Tyler Pipe Industries, Inc. v. State,* Thurston County Cause No. 81-2-00731-4 (emphasis added).

After TPI's request for injunctive relief was denied, it paid the tax and amended its complaint to seek a refund. Again, its constitutional claims were that nexus was insufficient and that the tax was not fairly related to benefits provided by the State. Amended Complaint-For Refund of Taxes and Interest Paid And Other Relief at 4. *Tyler Pipe Industries, Inc. v. State,* Thurston County Cause No. 81-2-00731-4. It was only after this Court's decision in *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984) that TPI concentrated its argument on the claim that the multiple activities exemption was discriminatory.[3]

In *Tyler Pipe,* 107 S.Ct. 2810 (1987) this Court disposed of all of TPI's claims. This Court, addressing the challenge brought by National Can Corporation in the companion appeal, U. S. Supreme Court Docket No. 85-2006, held "Washington's multiple activities exemption invalid because it places a tax burden upon manufacturers in

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[3]TPI briefly mentioned discrimination in its Memorandum of Authorities filed prior to trial, lumping it together with other objections for contesting a state's tax, namely lack of proper apportionment and, again, lack of fair relationship between the tax and services provided by the state. *Armco* prompted TPI to petition the trial court for reconsideration of its adverse decision on August 6, 1984.

Washington engaged in interstate commerce from which local manufacturers selling locally are exempt."[4] 107 S.Ct. at 2823. With regard to the claims TPI made prior to *Armco* this Court said: "We reject appellant [TPI's] nexus and fair apportionment challenges to the State's wholesale tax." 107 S.Ct. at 2823. This Court concluded by stating that: "Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand." 107 S.Ct. at 2823.

Tyler Pipe was handed down on June 23, 1987. Less than two months later, on August 10, 1987, the Washington legislature met in special session to respond to the decision. This Court indicated that the discrimination could be cured by "[e]ither a repeal of the manufacturing tax or an expansion of the multiple activities exemption" to allow a credit for similar taxes paid to other states. 107 S.Ct. at 2821. Following this Court's lead, the legislature repealed the multiple activities exemption and substituted a new system of credits. Under the new law a Washington manufacturer may take a credit against its Washington manufacturing taxes for selling gross receipts taxes paid to another state, local or foreign jurisdiction. Similarly, an out-of-state manufacturer may take a credit against its Washington selling tax for manufacturing gross receipts taxes paid to another state, local or foreign jurisdiction. Laws 1987, 2nd ex. sess., ch. 3. App. A. These credits eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction.

TPI's Jurisdictional Statement, however, disagrees with this Court that these credits "presumably cure the discrimination."[5] 107 S.Ct. 2821. TPI terms these credits "illusory" (J.S. 12), because no other states impose gross

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[4]TPI claims this Court invalidated Washington's tax system on *both* Commerce Clause and Due Process Clause grounds. J.S. 8. This is incorrect. *Tylor Pipe* sustained Washington's tax system under the Due Process Clause. 107 S.Ct. 2821-22.

[5]Approximately 80 taxpayers are currently challenging the constitutionality of the newly enacted credits in *American National Can Corporation, et al. v. Department of Revenue, State of Washington, et al.*, Thurston County Clause No. 88-2-00680-3.

receipts taxes to which TPI is subject. J.S. 12 and App. F. This assertion is important in this case because it constitutes an admission that TPI has not incurred an actual multiple tax burden as a result of the invalid multiple activities exemption.

On remand the Washington court ruled that this Court's decision in *Tyler Pipe* should not be applied retroactively. The court denied claims for refund before June 23, 1987, the date of this Court's decision in *Tyler Pipe. National Can*, 109 Wn.2d 878, 895 (1988). J.S. B-18. TPI now seeks review of this decision.

INTRODUCTION AND SUMMARY

1. We begin with an initial perspective of the Questions Presented by TPI. J.S. 2. They amount to little more than a claim that it is unfair to require TPI to pay any taxes to Washington — in the past or in the future. This claim does not raise a substantial federal question. This Court resolved the substantial Commerce Clause question in *Tyler Pipe*, 107 S.Ct. 2810 (1987). The issue of TPI's refund does not have the same significance.

Further, we dispute TPI's premise. Although TPI contends that the decision below subjects it to unconstitutional discrimination, the relief which TPI here seeks would actually amount to an unjustified preference and a windfall. The wholesaling B&O tax for which TPI seeks a refund is imposed on all wholesalers, interstate and local businesses alike, without exception. To be sure, we now know from *Tyler Pipe* that the Washington tax system had a constitutional defect. For the multiple activities exemption, as it existed during the periods in question, did not take into account another state's gross receipts taxes. And this feature of the exemption, the State now recognizes, subjected TPI to an unconstitutional risk of multiple taxation.

Less than two months after *Tyler Pipe* the Washington legislature enacted a system of credits that cured the constitutional defect found by this Court, *supra.*, p. 4. Yet TPI now assails that action as "illusory", stating, quite

accurately, that this legislation puts no money in its pocket, for TPI pays no gross receipts taxes to other states. J.S. 11-12 and App. F.

This, of course, pinpoints exactly why granting TPI a refund would be the granting of an unjustified preference and windfall. Had the legislature cured the defect earlier, prior to 1976, rather than in 1987, TPI would have no legitimate complaint. Yet TPI would have obtained not one dollar of benefit from that legislative action. TPI would have had to pay the same tax that was paid by its strictly local competitors. By asking now to be relieved of that tax, TPI seeks more than it would have obtained in the first place.

Quite simply, then, the remedy should be commensurate with the offense, and the decision below does no more than this. By asking for more, TPI is attempting to inject into Commerce Clause jurisprudence a kind of punitive damages theory. And the punitive damages would be inflicted upon the State for periods during which, under the settled law of this Court there was no constitutional defect at all. *See General Motors Corp. v. State*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 659 P.2d 463, appeal dism'd, 464 U.S. 1013 (1983).

2. With this overview we will summarize here and later detail our response to TPI's argument that the decision below is incorrect for essentially two reasons. First, the Washington Supreme Court is said to have erred in its conclusion that *Tyler Pipe* established a new principle of law by overruling clear past precedent on which the State relied. J.S. 14-17. Reliance is the first factor set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) that a court must evaluate in deciding whether to apply a decision only prospectively. Second, and apparently without regard to whether the *Chevron* factors were correctly applied, TPI contends that giving only prospective application to this Court's decision in *Tyler Pipe* would do unprecedented

violence to the Commerce Clause.[6] J.S. 11-13. In this regard, TPI argues that the interests protected by the Commerce Clause mandate that no decision invalidating some feature of a state's taxing system can ever be given only prospective application, for it would destroy the incentive to bring Commerce Clause challenges.

3. However, the Court below correctly adhered to the three *Chevron* factors. The tests themselves and their proper application accommodate the Commerce Clause interest of discouraging future discrimination against interstate business. The Commerce Clause does not peculiarly require litigants always be given retrospective relief when the *Chevron* tests for giving a decision only prospective application are otherwise satisfied.

With regard to the first *Chevron* factor TPI argues that to be applied only prospectively a decision must "establish a new principle of law that was not foreshadowed by earlier opinions" and that "*Tyler Pipe* creates no new principle of law." J.S. 14 and 16. This is not the test incorporated in the first *Chevron* factor. In *Chevron* this Court held that a new principle of law is established by "overruling clear past precedent on which litigants may have relied * * * *" 404 U.S. at 106. TPI simply ignores or overlooks this test. The Washington Supreme Court concluded that there was a new principle of law because of "the long line of cases upholding Washington B&O tax, [and] the fact that Tyler [Pipe] overruled past precedent on which the states may have relied * * * *" 109 Wn.2d at 882.

The Washington Supreme Court was equally careful in evaluating the second and third *Chevron* factors — purpose and inequity. The free trade purpose of the Commerce Clause would not be retarded by only prospective application of *Tyler Pipe* because whatever chill was imposed on interstate trade is in the past. Indeed, TPI contents that few other jurisdictions have similar taxes and that it was not subject to an actual multiple burden. Thus,

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[6]TPI first discusses the incentive to litigate and then the *Chevron* question. We reverse that order.

precisely because the discrimination and multiple burdens are more hypothetical than real, it is difficult to imagine that TPI's trade among the states was ever actually chilled in this case.

It would also be inequitable to require the State to make refunds given its reasonable reliance on past precedent. This case involves substantial sums. The State estimates that refunds for the period 1980 through 1984 would be in excess of $423 million. Again, this harm must be weighed against the fact that any refund to TPI would constitute an unjustified preference and a windfall.

4. TPI is also incorrect that only prospective application of *Tyler Pipe* will discourage litigation. This fear is unfounded. To obtain only prospective application of a decision, the three *Chevron* factors must be satisfied. Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Despite this possibility there has been no appreciable drop in litigation at either the state or federal level.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CORRECT

I. THE DECISIONS OF THIS COURT SUPPORT ONLY PROSPECTIVE APPLICATION OF A DECISION, EVEN AS APPLIED TO THE LITIGANTS.

In *Chevron*, 404 U.S. 97, 106-7 (1971) this Court set out three factors for determining whether the decision in a civil proceeding should be applied prospectively or retroactively. These three factors may be referred to as reliance, purpose and inequity. In *National Can*, 109 Wn.2d 878 (1988) the Washington Supreme Court carefully evaluated each factor in deciding not to apply *Tyler Pipe*, 107 S.Ct. 2810 (1987) retroactively.

TPI argues that *National Can* is incorrect and asserts that it is unaware of any decisions of this Court in which a decision has been applied only prospectively to deny monetary relief to the litigant.[7] J.S. 11. Two such decisions of this Court come immediately to mind: *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983).

Sunburst involved an action by a shipper to obtain a refund of freight overcharges. The Montana Supreme Court agreed with the shipper that there had been an overcharge and, in doing so, overruled one of its prior decisions. However, the Montana court applied its new rule only prospectively, thus denying the shipper its refund. In *Sunburst* this Court affirmed the decision of the Supreme Court of Montana and refused to find a denial of due process. 287 U.S. at 363-4.

In *Norris* this Court ruled that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering an annuity plan which uses sex based tables for calculating benefits. However, again, this Court ruled that the decision only applies to benefits derived from contributions collected after the effective date of *Norris*. 463 U.S. at 1111 (O'Connor, J., concurring).

Clearly TPI is incorrect in its assertion that it is unprecedented for this Court to apply its decisions only prospectively to the litigants before it.[8] The decision below is

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[7]At several points TPI emphasizes that it is a "nonresident, nonvoting taxpayer." J.S. 13 and 18. TPI implies that *National Can* applies only to nonresidents. This is incorrect. The court below also refused to apply *Tyler Pipe* retroactively for the benefit of Washington manufacturers, e.g., National Can Corporation and Kalama Chemical Corp.

[8]There is nothing in the opinion of this Court in *Griffith v. Kentucky*, 479 U.S. ____, 107 S.Ct. 708 (1987) to suggest that these earlier cases should be re-examined. In *Griffith*, a criminal proceeding, this Court ruled that if a decision is applied retroactively to the litigants it must then be applied retroactively to all cases pending on direct review. This case is a civil proceeding and quite different, for *National Can* refused to apply *Tyler Pipe* retroactively to the litigants themselves.

also correct and this case does not present important questions of law that must be resolved by this Court.[9] We will demonstrate this point by reviewing, in turn, each of the three *Chevron* factors and the manner in which they were applied below.

II. THE RELIANCE FACTOR — TYLER PIPE ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING PAST PRECEDENT ON WHICH THE STATE HAD JUSTIFIABLY RELIED.

In *National Can*, 109 Wn.2d at 882-88 (J.S. B-4 — B-10) the Washington Supreme Court concluded that *Tyler Pipe*, 107 S.Ct. 2810 (1987) had established a new principle of law because this Court had overruled past precedent. The court below placed primary reliance on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler* [*Pipe*] overruled past precedented on which the states may have relied * * * *" 109 Wn.2d at 882. J.S. B-4.

TPI argues that *National Can* is incorrect because "*Tyler Pipe* creates no new principle of law." J.S. 16. Significantly, TPI does not disagree that past precedent has been overruled. TPI simply ignores the significance of the overruling of past precedent as the Court establishes a new

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Thus, the chance beneficiary problem that troubled this Court in *Griffith*, 107 S.Ct. at 713, in the criminal context, is not present in this civil proceeding. This case falls squarely within "the appropriate scope of federal equitable remedies, a problem arising from the enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). In this case the equities, balanced as required in *Chevron*, compel the conclusion that *Tyler Pipe* should be applied only prospectively.

[9]If TPI's Jurisdictional Statement is regarded — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, the writ should not issue. This case fails to meet the considerations outlined in Rule 17.1 of the Rules of the Supreme Court. TPI alleges no conflict between the decision below and the decision of any other state or federal court or any decision of this Court. In addition, the Washington Supreme Court did not decide an important question of law which has not been, but should be, settled by this Court.

principle of law. J.S. 14. TPI's analysis of *Tyler Pipe* is fundamentally flawed because TPI ignores the substantial part of this Court's analysis. J.S. 14-16.

A. A New Principle of Law is Established When This Court Overrules Past Precedent.

The first *Chevron* factor is reliance. To be applied prospectively only a decision

> must *establish a new principle of law, either by [first] overruling clear past precedent on which litigants may have relied,* * * * or by [second] deciding an issue of first impression whose resolution was not clearly foreshadowed * * * *

Chevron, 404 U.S. at 106 (citations omitted, emphasis added).

TPI paraphrases the first *Chevron* factor inaccurately. According to TPI the decision to be applied only prospectively must "establish a new principle of law that was not clearly foreshadowed by earlier opinions." J.S. 14. TPI's paraphrase ignores the clear statement in *Chevron* that there are two alternative ways to establish a new principle of law. The first is "by overruling clear past precedent on which litigants may have relied." 404 U.S. at 106. TPI skips over the first alternative and focuses exclusively on the second: a new principle may be established "by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106.

Thus, TPI's argument is based on an inaccurate statement of the first *Chevron* factor. *Chevron* stands for the proposition that a new principle of law is established when this Court unmistakably overrules clear past precedent. The precedent overruled may be precedent of this Court or of other appellate courts. *Chevron*, 404 U.S. at 107 and *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022, 2025-26 (1987).

B. Tyler Pipe — Not Armco — Overruled Past Precedent In Holding The Multiple Activities Exemption Invalid Because Of The Risk Of Multiple Burden.

The Washington Supreme Court is correct — *Tyler Pipe* is the case that overruled past precedent. To establish this point we will briefly review *Tyler Pipe*.

This Court's discussion of the discrimination issue in *Tyler Pipe*, is contained in Part III of the opinion. 107 S.Ct. 2816-20. This Court was primarily concerned with the discrimination claim of Washington manufacturers. 107 S.Ct. 2813 and 2816. However, this Court's analysis also disposed of the discrimination claim made by out-of-state manufacturers such as TPI. 107 S.Ct. at 2821. There are two parts to this Court's analysis.

First, this Court considered the structure and consequences of the multiple activities exemption. 107 S.Ct. 2816-7. This Court relied on *Armco*, 467 U.S. 638 (1984) to establish that the manufacturing B&O tax was facially discriminatory. Second, this Court considered the State's argument that the manufacturing tax was valid as a compensating tax, despite the apparent facial discrimination. 107 S.Ct. at 2817-20. This Court concluded that the manufacturing B&O tax was not valid as a compensating tax because the multiple activities exemption held the potential for a discriminatory multiple burden. This Court's holding with regard to compensating taxes overruled past precedent. We begin with a discussion of that past precedent.

1. Prior to Tyler Pipe Washington's tax was repeatedly sustained; and compensating taxes were sustained despite the risk of multiple burdens.

Two aspects of the law prior to *Tyler Pipe* are important in this case. First, prior to *Tyler Pipe* Washington's B&O tax was repeatedly sustained against constitutional challenge. The B&O tax at issue in *Tyler Pipe*, including the multiple activities exemption, had remained essentially unchanged since 1950. As this Court noted in *Tyler Pipe*, 107 S.Ct. 2015 n.9, the constitutionality of this system had been challenged on several occasions and had always been sustained; sustained by the Washington

Supreme Court and Court of Appeals and sustained by this Court. See *B. F. Goodrich v. State*, 38 Wn.2d 663, 668, 231 P.2d 325 (1951), cert. denied, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 759, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 449 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 10 Wn.App. 45, 52, 516 P.2d 1043 (1973), aff'd 419 U.S. 560, 563 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983), appeal dismissed for want of a substantial federal question, 464 U.S. 1013 (1983). Thus, until this Court's decision in *Tyler Pipe* Washington's B&O tax was imposed with the full approval of the courts.

Second, prior to *Tyler Pipe* this Court sustained compensating taxes — such as the use tax — despite the possibility of a multiple burden. This Court has long been aware that a compensating tax may result in a multiple burden. The possibility of a multiple burden exists whenever one state imposes a use tax on goods without allowing a credit for sales taxes paid, on the same goods, to another state. Without the credit the same goods are potentially subject to both a sales tax and a use tax. In such a case the risk of a multiple burden is obvious.

Despite this possibility, this Court refused to invalidate a use tax, on the grounds of a potential multiple burden, until "a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); and *Williams v. Vermont*, 472 U.S. 14, 21-2 (1985). This Court applied the same rule in sustaining the Washington B&O tax in *General Motors*, 377 U.S. at 448-49 and *Standard Pressed Steel*, 419 U.S. at 563. Until *Tyler Pipe* this Court had consistently required taxpayers subject to compensating taxes to prove they were subject to an actual multiple burden; until *Tyler Pipe* the mere risk of such burden had not been enough.

2. Tyler Pipe overruled past precedent by holding the multiple activities exemption discriminatory, without proof of an actual multiple burden.

The manufacturing B&O tax appears discriminatory because it is imposed primarily on interstate commerce. However, a tax that appears discriminatory does not discriminate against interstate commerce, if it is a valid compensating tax. The use taxes sustained in *Silas Mason* and *Southern Pacific* also appeared facially discriminatory because they were imposed solely on goods from out of state.

In *Tyler Pipe* this Court ruled that the manufacturing tax was not valid as a compensating tax because the benefits of the multiple activities exemption did not extend to another state's taxes. This Court said that the multiple activities exemption eliminates "the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried on within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." 107 S.Ct. at 2820. To have a valid multiple activities exemption this Court said it would be necessary for the State to provide "a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. at 2819-20.

Thus, this Court ruled that the manufacturing tax was not valid as a compensating tax, because of the risk of multiple burden caused by the failure of the multiple activities exemption to take into account the taxes of other states. This Court also applied this analysis to the claims of out-of-state manufacturers. 107 S.Ct. at 2821. *Tyler Pipe* rests entirely on the *risk* of multiple burden. TPI never proved or even claimed it was actually subject to a gross receipts tax on manufacturing or selling imposed by another state. Indeed, TPI now claims that it does not pay such taxes because few other jurisdictions impose them. J.S. 12 and App. F.

Tyler Pipe, then, overruled past precedent in two respects. First, of course, it overruled prior decisions in Washington and of this Court sustaining the very tax system at issue in *Tyler Pipe*. See Section II(B)(1), *supra.*, p. 13. The majority specifically overruled *General Motors* to the extent it was inconsistent. 107 S.Ct. at 2820. Second, *Tyler Pipe* overruled this Court's prior decisions sustaining compensating taxes, despite the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state. 107 S.Ct. at 2824 (Scalia, J., dissenting). See Section II(B)(1), *supra.*, p. 13.

3. In Tyler Pipe this Court invoked Armco merely as a prelude to its discussion of the compensating tax issue.

TPI argues that because of this Court's reliance on *Armco*, *Tyler Pipe* cannot be viewed as overruling past precedent. J.S. 14-16. In fact, this Court invoked *Armco* only to set the stage for its discussion of the compensating tax issue. This Court began by noting that the multiple activities exemption "has the same facially discriminatory consequences as the West Virginia exemption * * * invalidated in *Armco*." 107 S.Ct. at 2816. This Court went on to say that its reliance in *Armco* on Justice Goldberg's dissent in *General Motors*, 377 U.S. 459-60 dooms the State's effort to distinguish "between an exemption from a wholesaling tax — as was present in *Armco* — and the exemption from a manufacturing tax" in *Tyler Pipe*. 107 S.Ct. at 2817. Thus, the taxes in both Washington and West Virginia appeared facially discriminatory. Washington's manufacturing tax would therefore be invalid *unless* it was a valid compensating tax.

As we have shown, *Armco* is not the case which accomplished the critical overruling. For only after *Tyler Pipe* do we know that a compensating tax, to be valid, must contain a credit for taxes paid to other states. 107 S.Ct. at 2819. However, after *Armco* no such credit was required. In *Williams v. Vermont*, 472 U.S. 14, 22 (1985), which was decided one term after *Armco*, this Court again

refused to strike down a use tax owing to the risk of multiple burden caused by the failure to allow a credit for sales tax paid to another state.[10] See *Tyler Pipe*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

To be sure, in *Armco* West Virginia argued that its wholesaling tax was valid as a compensating tax. This Court rejected the argument, however, because of difference in the rate and measure of West Virginia's wholesaling and manufacturing taxes. According to this Court, these differences "[make] clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax" on selling. 467 U.S. at 643. In contrast, this Court in *Tyler Pipe* recognized that the rate and measure of Washington selling and manufacturing B&O taxes were the same. 107 S.Ct. at 2813. This Court focused instead on the failure of the multiple activities exemption to encompass another state's gross receipts taxes. In so doing *Tyler Pipe* overruled critical past precedent.

III. THE PURPOSE FACTOR — THE PURPOSE OF THE COMMERCE CLAUSE WILL NOT BE IMPAIRED BY PROSPECTIVE APPLICATION OF TYLER PIPE.

The second factor is purpose. The test is "whether retrospective operation will further or retard" the operation of the new rule. *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 888-90 (J.S. B-10 — B-12) the Washington Supreme Court determined that purely prospective application of *Tyler Pipe*, 107 S.Ct. 2810 (1987) would not retard the Commerce Clause purpose of promoting an area of free trade among the states. The court concluded that "whatever chill was imposed on interstate trade is in the past * * * *" 109 Wn.2d at 888. J.S. B-11. Indeed, it is difficult to imagine that free trade among the states was actually chilled in this case. TPI contends that few other jurisdictions have similar taxes. J.S. 12 and App. F. Thus,

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[10]In *Williams* this Court did subsequently invalidate the use tax because it violated the Equal Protection Clause. 472 U.S. at 27.

the risk of multiple burden present in the multiple activities exemption "was not in fact an actual double burden for most of these litigants." 109 Wn.2d at 889. J.S. B-12.

Retroactive application of *Tyler Pipe* would actually frustrate the Commerce Clause policy that interstate commerce should pay its fair share of the cost of state government by creating "a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers." 109 Wn.2d at 890. J.S. B-12. The court thus recognized that the refunds demanded by TPI would constitute a windfall. For if the multiple activities exemption had encompassed another state's taxes in the first place, TPI would have been entitled to no refunds whatsoever.

TPI does not dispute the court's evaluation of the purpose of the Commerce Clause in its analysis of the purpose factor. Instead, TPI contends that giving *Tyler Pipe* only prospective application — even if all three *Chevron* factors are met — will discourage litigation and thus encourage future discrimination. J.S. 11-13. This fear is unfounded.[11] Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Sunburst*, 287 U.S. 358 (1932). Despite this possibility, there has been no appreciable drop in litigation at either the state or federal level. As the court observed in *National Can*, "taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability." 109 Wn.2d at 890. J.S. B-13.

TPI argues that the Washington Supreme Court's response is "spurious" because it will receive no future benefit from the two-way credit enacted by the Washington legislature in response to *Tyler Pipe*. J.S. 11-12. This is so,

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[11]A number of commentators concur that the fear of drying up litigation is overblown. Auerbach, Garrison, Hurst & Mermin, *The Legal Process*, 176-77 (1961); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 546-47 (1977); and Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1613-14 (1975).

says TPI, because it is not subject to a selling or manufacturing tax imposed by another state.[12]

TPI's argument ignores this Court's rationale in *Tyler Pipe*. This Court invalidated the multiple activities exemption because of the risk of multiple burden. Washington eliminated this risk by adopting this Court's suggestion of allowing credits against Washington taxes for manufacturing and selling taxes paid to other states. TPI received no benefit because it suffered no harm.

TPI appears to argue that the credit is illusory because it does not extend to other kinds of taxes such as income or franchise taxes. J.S. App. F. These other kinds of taxes do not result in a multiple burden. A taxpayer subject to a use tax must, after *Tyler Pipe*, receive a credit for sales taxes paid to another state on the same goods. This Court has never suggested that such credit must extend to other taxes such as income or franchise taxes.

The legislative credit eliminates the risk of multiple burden. If any other state adopted Washington's tax system, as it has the right to do, there would be no impermissible interference with free trade.[13] Thus, the risk of

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[12]TPI's assertion of its right to a full refund of taxes (J.S. 19-20) fails to acknowledge the existence of alternative remedies that would remain for consideration, even if a court were to reject the option of giving only prospective application to this Court's decision in *Tyler Pipe*. Under Washington's 1987 credit law, *supra.*, p. 4, credits would be granted retroactively were this Court to determine that relief should be appropriate for tax reporting periods prior to August 11, 1987. Also, as recognized by this Court in *Tyler Pipe*, 107 S.Ct. at 2822-23, a deficiency in the credit remedy might, as a matter of state law, warrant severance of this offending multiple activities exemption as it existed prior to the 1987 amendment. Finally, this Court recognized that a repeal of the manufacturing tax, effected judicially or legislatively, and providing refunds to in-state manufacturers, "would presumably cure the discrimination." 107 S.Ct. at 2821. The thrust of TPI's position is to reject the alternative remedies which all eliminate the risk of multiple tax burden. Its demand for a full refund of tax, as the only acceptable remedy, is the least justified alternative for a taxpayer in its situation.

[13]For example, in the oral argument in *Tyler Pipe*, its counsel indicated that Texas did not have a gross receipts tax but "one has been proposed for * * * enactment." Official Transcript Proceedings Before The Supreme Court of the United States at 18, *Tyler Pipe*. If Texas

multiple burden has been eliminated, and there is no disincentive for TPI to do business in Washington and another state with a manufacturing or selling gross receipts tax.

IV. THE INEQUITY FACTOR — IT WOULD BE INEQUITABLE TO APPLY TYLER PIPE RETROACTIVELY AND REQUIRE REFUNDS IN THIS CASE.

The third factor is inequity. The test is whether retroactive application of the Court's decision will "produce substantial inequitable results." *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 890-92 (J.S. B-12 — B-15) the Washington Supreme Court concluded that retroactive application of *Tyler Pipe*, 107 S.Ct. 2810 (1987) would be inequitable because "the State estimates refunds from 1980 through 1984 could be in excess of $423 million." 109 Wn.2d at 892. J.S. B-15. Against this harm must be weighed the fact that TPI suffered no actual harm from the now invalid multiple activities exemption. This Court invalidated the exemption because it created a risk of multiple burden for taxpayers potentially subject to taxes of other states by failing to encompass such other taxes. TPI paid no such taxes. J.S. 12 and App. F.

The court also emphasized that the State's "reliance was justified by the presumptive validity of the tax statute and the case law upholding that statute." 109 Wn.2d at 892. J.S. B-15. TPI charges that Washington "has a history of aggressive taxation." J.S. 12-13. The only thing aggressive about the State's conduct is that it has collected B&O taxes since 1950, the validity of which had been continually sustained by both the Washington Supreme Court and this Court until *Tyler Pipe*. See Section II(B)(1), *supra.*, p. 13.

TPI argues that it should receive a refund because the Washington Supreme Court earlier denied its request for an injunction in *Tyler Pipe Industries, Inc. v. Department*

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adopts a gross receipts tax, as it has a right to do, TPI will benefit from the Washington credit.

of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982) (*Tyler I*). J.S. 18. TPI sought this injunction on the ground that there was insufficient nexus to support the imposition of the tax. 96 Wn.2d at 793. See, *supra.*, p. 3. The Washington Supreme Court denied the injunction because TPI "has not made the requisite showing of a likelihood of success on the merits." 96 Wn.2d at 794. The Washington Supreme Court was correct. TPI did not prevail on its nexus claim before this Court in *Tyler Pipe*.[14]

TPI did not raise the question of multiple burden in the injunction proceeding. It was not until after *Armco*, 467 U.S. 638 (1984) that TPI focused on the discrimination issue, long after the injunction had been denied. Given its reliance on the nexus issue and its subsequent emphasis on the claim of discrimination after the fact of *Armco*, TPI's situation warrants no greater consideration for refund relief than the claims of other out-of-state manufacturers who, like TPI, have established no actual multiple tax burden for the years in issue.

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alternative, the judgment should be affirmed.[15]

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[14]TPI makes a related argument that it was deprived of its property without the opportunity for a hearing. J.S. 20. In fact, TPI had a full hearing prior to paying the tax. The Washington Supreme Court ruled against TPI in that hearing and denied injunctive relief because there was sufficient nexus to impose the tax. *Tyler I*. This Court affirmed that conclusion in *Tyler Pipe*.

[15]If TPI's Jurisdictional Statement is considered — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, TPI's petition should be denied.

DATED this 13th day of May, 1988.

Respectfully submitted,

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APPENDIX A

Wash. Rev. Code § 82.04.440, As Amended By Laws 1987, 2nd ex. sess., ch. 3.

(1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.250 or 82.04.260 subsection (4) shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the

credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states. [1987 2nd ex.s. c 3 § 2]

The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of

this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage. [1987 2nd ex.s. c 3 § 1]

If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before August 11, 1987, in respect to RCW 82.04.440 as it existed before August 11, 1987, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits. [1987 2nd ex.s. c 3 § 3]

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1987 2nd ex.s. c 3 § 4]